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No. 88-1972

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF ILLINOIS, PETITIONER

v.

LLOYD PERKINS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an undercover law enforcement officer must give *Miranda* warnings to an incarcerated suspect before asking him questions that may elicit an incriminating response.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
An undercover police officer need not administer *Miranda* warnings before eliciting incriminating statements from an incarcerated suspect	9
A. There is no per se requirement to administer *Miranda* warnings before questioning an incarcerated inmate	9
B. *Miranda* does not restrict an undercover agent's activities	14
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Arizona v. *Mauro*, 481 U.S. 520 (1987)	16, 19, 21, 22
Battie v. *Estelle*, 655 F.2d 692 (5th Cir. 1981)	14
Beckwith v. *United States*, 425 U.S. 341 (1976)	22
Berkemer v. *McCarty*, 468 U.S. 420 (1984)	16
Blain v. *Commonwealth*, 7 Va. App. 10, 317 S.E.2d 838 (1988)	13
Boutwell v. *State*, 256 Ga. 63, 344 S.E.2d 222 (1986)	13
California v. *Beheler*, 463 U.S. 1121 (1983)	16, 18
Casey v. *United States*, 276 U.S. 413 (1928)	23
Cervantes v. *Walker*, 589 F.2d 424 (9th Cir. 1978)	10, 11
Colorado v. *Connelly*, 479 U.S. 157 (1986)	20
Commonwealth v. *Chacko*, 500 Pa. 571, 459 A.2d 311 (1983)	13
Estelle v. *Smith*, 451 U.S. 454 (1981)	14
Flittie v. *Solem*, 775 F.2d 933 (8th Cir. 1985), cert. denied, 475 U.S. 1025 (1986)	21
Frazier v. *Cupp*, 394 U.S. 731 (1969)	20
Grimm v. *United States*, 156 U.S. (1895)	23

Cases—Continued: Page

Hamilton v. *State*, 62 Md. App. 603, 490 A.2d 763, cert. denied, 303 Md. 682, 496 A.2d 682 (1985) .. 13, 19
Hampton v. *United States*, 425 U.S. 484 (1976) 23
Hoffa v. *United States*, 385 U.S. 293 (1966) 8, 9, 20, 23
Holyfield v. *State*, 101 Nev. 793, 711 P.2d 834 (1985) 13, 19
Kuhlmann v. *Wilson*, 477 U.S. 436 (1986) 23
Leviston v. *Black*, 843 F.2d 302 (8th Cir.), cert. denied, 109 S. Ct. 168 (1988) 13
Lewis v. *United States*, 385 U.S. 206 (1966) 23
Lopez v. *United States*, 373 U.S. 427 (1963) 20, 23
Maine v. *Moulton*, 474 U.S. 159 (1985) 22
Massiah v. *United States*, 377 U.S. 201 (1964) 22
Mathis v. *United States*, 391 U.S. 1 (1968) 5, 7, 12
Michigan v. *Tucker*, 417 U.S. 433 (1974) 10
Minnesota v. *Murphy*, 465 U.S. 420 (1984) 9, 16, 22
Miranda v. *Arizona*, 384 U.S. 436 (1966) .. 2, 9-10, 11-12, 15
Ohio v. *Swinney*, No. 37 CA 41 (1989 WESTLAW 86260) (Ohio App. July 15, 1989) 13
Oregon v. *Elstad*, 470 U.S. 298 (1985) 18
Oregon v. *Mathiason*, 429 U.S. 492 (1977) 8, 16, 21
Palmigiano v. *Baxter*, 510 F.2d 534 (1st Cir. 1974), rev'd, 425 U.S. 309 (1976) 14
People v. *Aalbu*, 696 P.2d 796 (Colo. 1985) 13
People v. *Smith*, 117 Misc. 2d 737, 459 N.Y.S.2d 528 (Sup. Ct. 1983) 13
People v. *Williams*, 44 Cal. 3d 1127, 751 P.2d 901, 245 Cal. Rptr. 635, cert. denied, 109 S. Ct. 514 (1988) 13
Price v. *United States*, 165 U.S. 311 (1897) 23
Procunier v. *Atchley*, 400 U.S. 446 (1971) 20
Rhode Island v. *Innis*, 446 U.S. 291 (1980) 6, 16, 18
Roberts v. *United States*, 445 U.S. 552 (1980) 22
State v. *Fuller*, 204 Neb. 196, 281 N.W.2d 749 (1979) 13
State v. *Fulminante*, 778 P.2d 602 (Ariz. 1989) 13
State v. *LaRue*, 19 Wash. App. 841, 578 P.2d 66 (1978) 13
State v. *McDonald*, 387 So. 2d 1116 (La.), cert. denied, 449 U.S. 957 (1980) 13

Cases—Continued: Page

State v. *McMullan*, 713 S.W.2d 881 (Mo. Ct. App. 1986) 19
State v. *Perkins*, 753 S.W.2d 567 (Mo. Ct. App. 1988) 13, 19
State v. *Travis*, 116 R.I. 678, 360 A.2d 548 (1976) .. 13, 19
United States v. *Brown*, 466 F.2d 493 (10th Cir. 1972) 19
United States v. *Conley*, 779 F.2d 970 (4th Cir. 1985), cert. denied, 479 U.S. 830 (1986) 10, 11, 13
United States v. *Cooper*, 800 F.2d 412 (4th Cir. 1986) 11
United States v. *Fioravanti*, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969) 17, 19
United States v. *Hayes*, 646 F. Supp. 146 (N.D. Ind. 1986) 11
United States v. *Henry*, 447 U.S. 264 (1980) 22
United States v. *Russell*, 411 U.S. 423 (1973) 23
United States v. *Scalf*, 725 F.2d 1272 (10th Cir. 1984) 11
United States v. *Washington*, 431 U.S. 181 (1977) 9
United States v. *White*, 401 U.S. 745 (1971) 23
United States v. *Willoughby*, 860 F.2d 15 (2d Cir. 1988), cert. denied, 109 S. Ct. 846 (1989) 12-13, 17, 19

Constitution:

U.S. Const.:
Amend. V 6, 8, 19, 20, 24
Self-Incrimination Clause 9, 21
Amend. VI 22, 23

Miscellaneous:

Dix, *Undercover Investigations and Police Rulemaking*, 53 Tex. L. Rev. 203 (1975) 18
Kamisar, Brewer *v.* Williams, Massiah, *and* Miranda: *What is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. 1 (1978) 16, 17, 18
White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581 (1979) 18

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INTEREST OF THE UNITED STATES

This case presents the question whether law enforcement authorities may use undercover officers to question the uncharged suspect of a crime while he is incarcerated in a jail or prison. The United States has an interest in the Court's resolution of that question for several reasons. The federal government operates numerous jail and prison facilities for persons who have been arrested for or convicted of a crime. The Court's decision in this case will therefore affect the ability of the federal government to use this law enforcement tool. The federal government also prosecutes cases referred from state or local authorities. The Court's decision will affect the federal govern-

ment's ability to prosecute such cases in which state undercover agents have obtained admissions from incarcerated suspects. Finally, the federal government has an interest in the Court's interpretation of the scope of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), an issue that is raised by this case.

STATEMENT

1. On November 8, 1984, Richard Stephenson was shot and killed in Fairview Heights, a suburb of East St. Louis, Illinois. No one was arrested for the homicide, and as of early 1986 the crime remained unsolved. In March of that year, Donald Charlton told police officers that he had information concerning a homicide in the East St. Louis area that had occurred about two years earlier. Charlton, an inmate at the Graham Correctional Facility in Hillsboro, Illinois, was serving a six-year prison sentence for burglary. He told police that he had met respondent when they were imprisoned together at the Graham facility, and that respondent had said he had murdered someone in East St. Louis. Although Charlton did not know the victim's name, the facts Charlton related closely coincided with the facts known to the officers about the murder of Richard Stephenson. The police concluded that only the perpetrator would know the facts of the murder in the detail that Charlton related. Pet App. 2a; Tr. 3-6, 26, 57-60, 72; 4/11/86 Tr. 2-3.[1]

Following up on Charlton's leads, the officers learned that respondent had recently been released from custody. The officers then decided to use Charl-

[1] "Tr." refers to the transcript of the February 18, 1987, suppression hearing. The hearing on April 11, 1986, was a preliminary hearing.

ton as an informant to elicit information from respondent. The officers obtained a court order releasing Charlton from the Graham facility on March 28, and they arranged to have Charlton wear a body recording device when he met with respondent. During the next three days, Charlton made several efforts to contract respondent but was unable to reach him. Tr. 7-8, 19, 21-22, 26-28, 61-62.

On March 30, 1986, the officers learned that respondent was being held in the Montgomery County, Illinois, jail pending trial for an unrelated charge of aggravated battery. The officers decided that it would be impractical to use an eavesdropping device in respondent's cell or a body recording device on an undercover officer. The officers decided, however, to place an undercover agent posing as an escaped convict with respondent in the jail cellblock to seek to learn whether respondent had committed the Stephenson murder. Pet. App. 2a; Tr. 8-10, 28-30.

The following day, John Parisi, the officer who was to serve as the undercover agent in the jail, met with Charlton at the Fairview Heights police station. Parisi and Charlton were instructed to engage respondent in conversation and to report anything that he said about the Stephenson murder. Their cover story would be that after escaping from a Cook County, Illinois, work release program, Parisi and Charlton made their way to Montgmery County in order to join respondent so that all three could leave for California, but that they were arrested in the course of a burglary. That evening, Parisi, who was using the alias "Vito Bianco," and Charlton were processed into the jail and dressed in jail clothes. They were then placed in the cellblock, which consisted of 12 separate cells that opened into a large

room. Pet. App. 2a-3a; Tr. 10-13, 16-18, 35-40, 54-55, 63-65.

After entering the cellblock, Charlton spoke with respondent briefly and introduced him to Parisi. Parisi told respondent that he "wasn't going to do any more time," Tr. 41, and he suggested that all three should escape from the jail. Respondent replied that the Montgomery County jail was "a rinky-dink jail" and that they could "break out." *Ibid.* He also said that he could arrange to have someone smuggle in a gun, and the three of them decided to kill anyone who tried to interfere with their escape. Respondent then showed Agent Parisi a hidden, makeshift crowbar that respondent said could be used during their escape to take the jail guard hostage. The three decided to meet later that evening after the other inmates went to sleep. Pet. App. 2a; Tr. 40-43, 65-67.

Agent Parisi, Charlton, and respondent met at midnight in respondent's cell. Respondent said that his girlfriend could smuggle an automatic pistol into the jail on visiting day, April 1. Tr. 43-45. Charlton said, "'Hey, I'm not a murderer, I'm a burglar. That's your guys' profession.'" Tr. 44; see Tr. 67. After telling Charlton that he would be responsible for any murder that occurred, Parisi asked respondent, "Have you ever done anybody[?]" Tr. 44. Respondent said he had, and then recounted in detail the events of the Stephenson murder for approximately 35 minutes. Tr. 45-49.[2] Afterward, Parisi

[2] Respondent said that he was paid $5,000 for the "job" by a man who wanted Stephenson maimed because Stephenson owed the man money for narcotics and was having an affair with the man's wife. Respondent explained that he had "cased" Stephenson's house for about a week before the murder. On the day of the murder, respondent approached Stephenson's house at 8:30 p.m. wearing a trench coat to conceal a sawed-off .12 gauge shotgun. Stephenson met respondent at the door to his home, and he asked respondent to step into the garage. As the garage door opened, respondent asked the victim if his name was "Steve," and he then shot Stephenson in the right leg. Respondent was about to shoot Stephenson again, but he decided not to do so because he heard several dogs barking in the garage. The shotgun blast severed Stephenson's femoral artery, and he bled to death in 30 seconds. Respondent then ran back to the car and drove away with his two confederates. Tr. 45-49, 68-70; 4/11/86 Tr. 5.

and respondent engaged in the "usual jailhouse talk" while watching television for 15-20 minutes. Respondent then went to sleep on the floor outside his cell. Parisi and Charlton did not again speak to respondent. Tr. 50, 70-71. Parisi did not give respondent *Miranda* warnings before speaking with him. Pet. App. 3a-4a.

On April 1, respondent was arrested and charged with the Stephenson murder. Respondent was given *Miranda* warnings, and he asked for a lawyer. Pet. App. 3a; Tr. 14-16, 22-24, 32-33, 52, 56, 71.

2. Before trial, respondent moved to suppress the statements made to Agent Parisi in the Montgomery County jail. Following an evidentiary hearing, the trial court granted the motion to suppress. The court ruled that Parisi and Charlton were "agents of the State and had conducted questioning of the defendant concerning the alleged offense while he was in custody and without advising him of his rights" as required by *Miranda*. Pet. App. 11a.

3. On the State's appeal, the Appellate Court of Illinois, Fifth Judicial District, affirmed. Pet. App. 1a-9a. Relying on *Mathis v. United States*, 391 U.S. 1 (1968), the court held that respondent was "in custody" for purposes of *Miranda* since he was incarcerated at the time he was questioned, even

though he was not being held on the Stephenson murder charge. Pet. App. 5a. According to the court, "*Miranda* applies even when the purpose of the custody is unrelated to the purpose of the interrogation, as in the instant case." *Ibid.* Moreover, the court ruled that Agent Parisi's questioning of respondent amounted to an "interrogation" as this Court used the term in *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). Pet. App. 5a-6a. The Illinois court explained that "the placement of Parisi in the cellblock with [respondent], and Parisi's inquiry whether [respondent] had ever 'done someone[,]' were words and actions reasonably likely to elicit an incriminating response from [respondent]." *Id.* at 6a.

The court rejected the State's argument that *Miranda* applies "only in those situations where a figure of authority directly interrogates the accused" and, accordingly, does not apply to questioning by an undercover police officer. Pet. App. 8a-9a. "There is no authority in these circumstances," the court stated, "for the police to do indirectly what they may not do directly." *Id.* at 8a. Underlying *Miranda*, the court wrote, "is the conviction that a warning before questioning is essential in overcoming the pressures of interrogation and in aiding the truth-finding function." *Ibid.* Allowing the use of an undercover officer to elicit an incriminating statement from a person in custody would encourage law enforcement personnel to use "surrepitious tactics" to "subvert" a suspect's Fifth Amendment privilege against compulsory self-incrimination, and "would render [respondent's] fifth-amendment privilege wholly meaningless." *Id.* at 8a-9a.

The Illinois Supreme Court denied the State leave to appeal. Pet. App. 10a.

SUMMARY OF ARGUMENT

1. This Court's decision in *Mathis* v. *United States*, *supra*, does not require the extraordinary procedure that all incarcerated suspects receive *Miranda* warnings before speaking with an undercover officer. *Mathis* did not involve the use of an undercover officer to talk with a suspect in jail; inasmuch as the latter practice does not raise the same concerns that underlay the Court's decision in *Miranda*, the rules adopted in that case should not apply in this quite different setting.

The concept of "custodial interrogation" within the meaning of *Miranda* is limited to settings in which police questioning creates the type of coercion that can overcome a suspect's will to remain silent. A prison inmate is not subject to the kinds of coercion associated with "custodial interrogation" any time he is questioned by officials, simply because he is not free to leave the prison: it follows, *a fortiori*, that a prison inmate is not subjected to "custodial interrogation" when he is questioned by an undercover agent. An undercover agent's conversation with a suspect in jail will not be seen by the suspect as coercive or threatening, since the suspect will believe that he is speaking to a fellow inmate. Deception to elicit information voluntarily provided is simply not coercion. Accordingly, the use of an undercover agent to speak to a suspect in jail does not trigger the procedures required in *Miranda* for circumstances constituting "custodial interrogation."

2. When it employs an undercover agent rather than a readily identifiable police officer to speak with an incarcerated suspect, the government is not doing indirectly what *Miranda* forbids it from doing directly. The purpose of the procedures adopted in *Miranda* was to prevent law enforcement officers from using a coercive setting to extract from a suspect a confession that he would not have given in an unrestrained environment. But an undercover agent does not coerce a suspect into confessing; the officer lulls a suspect into confessing by taking advantage of the suspect's misplaced trust in a fellow prisoner. This Court held in *Hoffa* v. *United States*, 385 U.S. 293 (1966), that the use of an informant to obtain incriminating statements from a suspect is not a form of coercion; a decade later the Court held in *Oregon* v. *Mathiason*, 429 U.S. 492 (1977), that police deception does not itself render a setting coercive under *Miranda*. The use of undercover officers has long been accepted as a legitimate investigative technique, and it is often the only means of identifying a guilty party. The rule adopted by the Illinois court in this case effectively prevents the police from using that practice if a suspect is incarcerated. Such a rule would impose a costly burden on law enforcement without measurably adding to the protection of a suspect's legitimate Fifth Amendment interests.

ARGUMENT

AN UNDERCOVER POLICE OFFICER NEED NOT ADMINISTER *MIRANDA* WARNINGS BEFORE ELICITING INCRIMINATING STATEMENTS FROM AN INCARCERATED SUSPECT

A. There Is No Per Se Requirement To Administer *Miranda* Warnings Before Questioning An Incarcerated Inmate

The Self-Incrimination Clause of the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." As the text of the Clause indicates, "a necessary element of compulsory self-incrimination is some kind of compulsion." *Hoffa* v. *United States*, 385 U.S. 293, 304 (1966). Accord *United States* v. *Washington*, 431 U.S. 181, 187 (1977) ("Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions."). Furthermore, the Clause is not self-executing; a person against whom official compulsion is directed must invoke the privilege in a timely manner or forfeit its benefits, despite the fact that the requested disclosure will prove incriminating. *Minnesota* v. *Murphy*, 465 U.S. 420, 427-428 (1984) (collecting cases).

Miranda created a limited exception to that rule for the unique environment of police custodial interrogation. In that context, the Court excused a person's failure to invoke the privilege because the Court believed that official interrogation of a suspect in a police-dominated, custodial environment invariably generates "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise

do so freely." 384 U.S. at 467. To dissipate that compulsion, *Miranda* regulated the conduct of police custodial interrogation by devising prophylactic safeguards that are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974).

Miranda involved custodial police questioning of individuals suspected of criminal activity who were not otherwise confined. A prison inmate who is questioned without the imposition of any additional restraints on his liberty is not in the same position for purposes of *Miranda* as a suspect who was previously at liberty and is taken into custody for the purpose of questioning. The courts of appeals have recognized that "[a] rational inmate will always accurately perceive that his ultimate freedom of movement is absolutely restrained and that he is never at liberty to leave an interview conducted by prison or other government officials." *United States* v. *Conley*, 779 F.2d 970, 973 (4th Cir. 1985), cert. denied, 479 U.S. 830 (1986). Thus, to apply the traditional standard for determining whether an interviewee is in custody for purposes of *Miranda* "would be tantamount to a *per se* finding of 'custody' " for prison inmates. *Ibid.*; see also *Cervantes* v. *Walker*, 589 F.2d 424, 427-428 (9th Cir. 1978) (application of the traditional "free to leave" standard would "lead to the conclusion that all prison questioning is custodial because a reasonable prisoner would always believe he could not leave the prison freely," thus leading to "the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart").

A prison inmate, of course, cannot leave his surroundings and therefore is literally "in custody" at all times. But the restraints on an inmate's liberty that are a constant feature of prison life become familiar to the inmate and are therefore unlikely to have the coercive effect that *Miranda* warnings are designed to dispel. The inherently coercive effects that *Miranda* found to be associated with custodial interrogation arise in the prison context only if an inmate's liberty is further limited, for purposes of the interrogation, in a manner different from what the inmate experiences as the standard condition of day-to-day prison life. As the Ninth Circuit has observed, "[i]n the prison situation, [the concept of restricting the suspect's freedom] necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement. * * * [W]e look to some act which places further limitations on the prisoner." *Cervantes* v. *Walker*, 589 F.2d at 428; accord *United States* v. *Cooper*, 800 F.2d 412, 414-415 (4th Cir. 1986); *United States* v. *Conley*, 779 F.2d at 972-974; *United States* v. *Scalf*, 725 F.2d 1272, 1275-1276 (10th Cir. 1984); *United States* v. *Hayes*, 646 F. Supp. 146, 149-151 (N.D. Ind. 1986). For these reasons, a prison inmate should be deemed to be in custody for purposes of *Miranda* only if he is subjected to more than the usual restraint on his liberty to depart. *Cervantes* v. *Walker*, 589 F.2d at 428.[3]

[3] Aside from the effect that a per se rule requiring *Miranda* warnings would have on cases like this one, that rule would disrupt the ability of prison administrators to conduct informal questioning of an inmate about, for example, a prison disturbance. Yet, *Miranda* said that it was "not intended to hamper the traditional function of police officers in investi-

We do not believe that a contrary result is required by this Court's decision in *Mathis* v. *United States*, 391 U.S. 1 (1986). In *Mathis*, an inmate incarcerated in a state prison was interviewed by an agent of the Internal Revenue Service about possible federal income tax violations. The agent did not administer *Miranda* warnings before initiating the questioning. This Court reversed the inmate's subsequent conviction for filing false tax returns on the ground that incriminating statements made in the course of the interview should not have been admitted at trial. The Court rejected the government's argument that *Miranda* is applicable "only to questioning [of] one who is 'in custody' in connection with the very case under investigation." 391 U.S. at 4-5.

To be sure, the Court's brief opinion in *Mathis* can be read as establishing a per se rule that an inmate who is subject to questioning is automatically "in custody" and is therefore entitled to *Miranda* warnings merely by virtue of his status as a prisoner. We believe, however, that *Mathis* is better understood as simply rejecting the government's competing per se rule that *Miranda* should not be applicable to an inmate who is in custody in connection with a case other than the one under investigation. Several courts of appeals have interpreted *Mathis* in that fashion. See *United States* v. *Willoughby*, 860 F.2d 15, 23 (2d

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gating crime" and that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by [the Court's] holding." 384 U.S. at 477. To define all questioning in the prison setting as "custodial interrogation" for purposes of *Miranda* would deprive law enforcement officers and prison administrators of their ability to conduct such informal questioning free of the constraints of *Miranda* procedures.

Cir. 1988) ("the mere fact of imprisonment does not mean that all of a prisoner's conversations are official interrogations that must be preceded by *Miranda* warnings"), cert. denied, 109 S. Ct. 846 (1989); *Leviston* v. *Black*, 843 F.2d 302, 304 (8th Cir.) ("incarceration does not *ipso facto* render an interrogation custodial"), cert. denied, 109 S. Ct. 168 (1988); *United States* v. *Conley*, 779 F.2d at 972; *Cervantes* v. *Walker*, 589 F.2d at 427.[4] Under that interpretation, a prisoner is not put in a better position than an ordinary citizen by being entitled to *Miranda* warnings prior to questioning of any sort, regardless of the setting. On the other hand, the prisoner is not put in a worse position than unincarcerated persons, since he is entitled to *Miranda* warnings if the normal cir-

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[4] Most state courts that have addressed the issue have reached the same conclusion. See *State* v. *Fulminante*, 778 P.2d 602, 607 (Ariz. 1989); *People* v. *Williams*, 44 Cal. 3d 1127, 1141-1142, 751 P.2d 901, 910-911, 245 Cal. Rptr. 635, 644-645, cert. denied, 109 S. Ct. 514 (1988); *People* v. *Aalbu*, 696 P.2d 796 (Colo. 1985); *Boutwell* v. *State*, 256 Ga. 63, 344 S.E.2d 222 (1986); *State* v. *McDonald*, 387 So. 2d 1116, 1120 (La.), cert. denied, 449 U.S. 957 (1980); *Hamilton* v. *State*, 62 Md. App. 603, 609-617, 490 A.2d 763, 766-770, cert. denied, 303 Md. 682, 496 A.2d 682 (1985); *People* v. *Smith*, 117 Misc. 2d 737, 739-740, 459 N.Y.S.2d 528, 532 (Sup. Ct. 1983); *Ohio* v. *Swinney*, No. 87 CA 41 (1989 WESTLAW 86260) (Ohio App. July 15, 1989); *Blain* v. *Commonwealth*, 7 Va. App. 10, 13-15, 371 S.E.2d 838, 840-841 (1988). Contra *State* v. *Perkins*, 753 S.W.2d 567, 570-573 (Mo. Ct. App. 1988); *State* v. *Fuller*, 204 Neb. 196, 281 N.W.2d 749 (1979); *Holyfield* v. *State*, 101 Nev. 793, 801-802, 711 P.2d 834, 839-841 (1985); *Commonwealth* v. *Chacko*, 500 Pa. 571, 577-578, 459 A.2d 311, 314-315 (1983); *State* v. *Travis*, 116 R.I. 678, 681-683, 360 A.2d 548, 550-551 (1976); *State* v. *LaRue*, 19 Wash. App. 841, 845-846, 578 P.2d 66, 69 (1978).

cumstances of his confinement are changed for purposes of the interview in question.[5]

B. *Miranda* Does Not Restrict An Undercover Agent's Activities

Even if *Mathis* is interpreted to require that formal questioning in the prison setting always be preceded by *Miranda* warnings, that principle should not be extended to communications between suspects and undercover agents. Conversations between a suspect and an undercover agent bear no resemblance to the kind of custodial interrogation that gave rise to the Court's *Miranda* decision, and the principles of *Miranda* therefore cannot sensibly be applied in that setting.

A meeting between an undercover agent and a prisoner bears none of the hallmarks of the coercive environment with which the Court in *Miranda* was concerned. In this case, for example, respondent would not have assumed that "Vito Bianco" had any

[5] Formal investigative questioning of an inmate typically results in a change in the normal circumstances of the inmate's confinement that may justify a finding that the inmate was in custody for *Miranda* purposes. That was the case in *Mathis*, and it was also the case in several of the court of appeals cases that have held *Miranda* applicable to interrogation of a prison inmate. See *Battie* v. *Estelle*, 655 F.2d 692, 699 (5th Cir. 1981) (defendant awaiting trial in county jail was entitled to *Miranda* warnings when he was examined by a court-appointed psychologist); *Palmigiano* v. *Baxter*, 510 F.2d 534, 536-537 (1st Cir. 1974), rev'd on other grounds, 425 U.S. 308 (1976) (*Miranda* warnings required when incarcerated suspect was interviewed in connection with prison disciplinary proceeding); see also *Estelle* v. *Smith*, 451 U.S. 454, 466-469 (1981) (warnings must precede court-ordered psychiatric examination of prisoner).

legal authority to interrogate him or that he had any legal responsibility to answer, that their conversations would continue until he confessed to murdering Stephenson, or that his insistence on remaining silent might lead to physical abuse. To the contrary, respondent was free to ignore Agent Parisi when they were introduced, to skip their midnight meeting, or to leave it at any time.

Respondent may have believed that it was necessary to recount the details of the Stephenson murder in order to impress "Vito Bianco," and respondent probably felt secure that doing so was harmless, because he and "Vito Bianco," in Charlton's words, were members of the same "profession." Tr. 44. But respondent certainly did not incriminate himself because of any fear that "Vito Bianco" would see to his imprisonment or would impose some form of extra-legal punishment if he remained silent. That fact is crucial because it was the psychological technique of subtly instilling that fear in a suspect in custody that *Miranda* sought to counteract through the requirement of warnings. *Miranda* was not even remotely concerned with rescuing a suspect from foolhardy bravado.

That the practice of using an undercover agent is designed to elicit a confession from a suspect provides no ground for objection. *Miranda* did not forbid the government from obtaining a confession to prove a defendant's guilt. In fact, *Miranda* emphasized that "[c]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence." 384 U.S. at 478. In subsequent decisions, the Court has also refused to treat as a form of "custodial interrogation" law enforcement practices that did not offend the concerns under-

lying *Miranda*, even though in each case the officers either believed or knew that the suspect might incriminate himself. See, *e.g.*, *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *California* v. *Beheler*, 463 U.S. 1121 (1983); *Minnesota* v. *Murphy*, *supra*; *Arizona* v. *Mauro*, 481 U.S. 520 (1987). The practice here cannot be treated as the equivalent of a classic stationhouse interrogation simply because both share the same goal or have similar prospects of success. It can be deemed custodial interrogation under *Miranda* only if it creates the same coercive environment that *Miranda* described.

Only a readily identifiable law enforcement officer can instill such fear in a suspect. As Professor Kamisar has written, a police officer's actions " 'take on color from [his] uniform, badge, gun and demeanor.' " Kamisar, Brewer *v.* Williams, Massiah, *and* Miranda: *What Is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. 1, 67 (1978). The threatening nature of the setting is important, because the question whether a suspect has been subjected to a custodial interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980).[6] Thus, if an officer "carries neither badge nor gun and wears not 'police blue,' but the same prison gray" as the suspect, Kamisar, 67 Geo. L.J. at 67, "the interplay of interrogation and custody," *Innis*, 446 U.S. at 299, that troubled the Court in *Miranda* is not present, because "the suspect thinks

[6] See also *Berkemer* v. *McCarty*, 468 U.S. 420, 442 (1984) ("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.")

he is dealing only with someone 'in the same boat,' as well as the same cell." Kamisar, 67 Geo. L.J. at 67. As the Third Circuit has explained:

> [I]t is inconceivable that the defendant could have experienced the coercion-born type of fear and intimidation set forth in *Miranda*, because when he volunteered this incriminatory statement, he thought that he was conversing with a fellow partner in crime, not a policeman. The predicate of *Miranda* is the inherently coercive nature of police interrogation of a person in custody; it cannot have application to a situation where one, not under stress of interrogation, simply volunteers a statement which perchance turns out to be inculpatory.

United States v. *Fioravanti*, 412 F.2d 407, 413-414, cert. denied, 396 U.S. 837 (1969) (footnote omitted). See also *United States* v. *Willoughby*, 860 F.2d at 23-24.[7]

[7] As Professor Kamisar has noted, 67 Geo. L.J. at 65 (footnotes omitted):

> When a suspect is arrested and brought downtown for police questioning, at least in the case of a major felony, he will often be in "a crisis-laden situation. The stakes for him are high—often his freedom for a few or many years—and his prospects hinge on decisions that must be quickly made: to cooperate and hope for leniency, to try and talk his way out, to stand adamantly on his rights." But why, when he thinks he is merely conversing with a fellow prisoner, when he has no notion that he is confronting the police, would a suspect worry about "how much leniency cooperation may earn, how likely fast talk is to succeed, and how much a steadfast refusal to talk may contribute to a decision by the police, prosecutor or judge to 'throw the book' at him"?
>
> One can deliberately elicit incriminating statements from a person without having him realize it—that is

It is wrong to contend that *Miranda* warnings are necessary to create a "level playing field" because a suspect in jail is especially vulnerable due to his confinement and therefore may unwisely utter incriminating statements to other inmates who turn out to be informants.[8] Although confinement generates anxiety, *Innis* recognized that the anxiety caused by incarceration does not require the suppression of a suspect's unwarned statements. 446 U.S. at 300; see Kamisar, 67 Geo. L.J. at 61-62. It is also irrelevant that an inmate mistakenly believes that his cellmate is a fellow prisoner. "This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." *Oregon* v. *Elstad*, 470 U.S. 298, 316 (1985). See also *Beheler*, 463 U.S. at 1125-1126 n.3. The police do not violate *Miranda* by listening to a suspect who voluntarily but unwittingly incriminates himself by admitting conduct that he does not know to be criminal. So, too, the police do not violate *Miranda* by listening to a suspect who voluntarily but unwit-

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what happened in *Massiah*. But how can one envelop someone in a "police-dominated atmosphere" without having him realize it? How can one produce an "interrogation environment" well-calculated to "subjugate the individual to the will of his examiner" when the individual is not even aware that he is in the presence of "his examiner"? That is why, I submit, whatever may lurk in the heart or mind of the fellow prisoner (or apparent friend or colleague), if it is not "custodial police interrogation" *in the eye of the beholder*, then it is not such interrogation within the meaning of *Miranda*.

[8] See Dix, *Undercover Investigations and Police Rulemaking*, 53 Tex. L. Rev. 203, 230 (1975); White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581, 604-605 (1979).

tingly incriminates himself by confessing facts about a known crime to an unknown police officer. Neither case has the element of coercion that prompted the Court in *Miranda* to scrutinize the process of in-custody interrogation.

In this case, the state appellate court was highly critical of Agent Parisi's use of a ruse to hoodwink respondent into believing that the agent was a fellow "ex-con" seeking to escape from jail. That court believed that permitting law enforcement officers to act in that manner would improperly allow "the police to do indirectly what they may not do directly," to "subvert" *Miranda*, and to render "wholly meaningless" a suspect's Fifth Amendment privilege. Pet. App. 8a-9a. A few other courts have endorsed that view as well.[9] That view, however, fundamentally misconceives the concerns informing *Miranda*.

In the undercover setting, the officer is not "using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Mauro*, 481 U.S. at 530. Rather, the officer is taking advantage of the suspect's misplaced trust in a fellow prisoner. But there is nothing improper about requiring a suspect to bear the risk of disloyalty. It is well settled that a person can be made to bear the risk that his acquaintances will reveal his statements to a larger audience. "The risk inheres in all communications which are not in the

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[9] See *United States* v. *Brown*, 466 F.2d 493 (10th Cir. 1972); *State* v. *Perkins*, 753 S.W.2d at 570-571; *State* v. *McMullan*, 713 S.W.2d 881 (Mo. Ct. App. 1986); *Holyfield* v. *State*, 101 Nev. at 801-804, 711 P.2d at 839-841; *State* v. *Travis*, 116 R.I. at 681-683, 360 A.2d at 550-551. Contra *United States* v. *Willoughby*, 860 F.2d at 23-24; *Hamilton* v. *State*, 62 Md. App. at 611-616, 490 A.2d at 767-770. Cf. *United States* v. *Fioravanti*, 412 F.2d at 413-414.

sight of the law privileged," *Lopez* v. *United States*, 373 U.S. 427, 450 (1963) (Brennan, J., dissenting), and communications made during the course of a conspiracy to break out of "a rinky-dink jail" and assault a prison guard in the process do not fit into that category.

Nothing in *Miranda* put an end to that police practice, even for a suspect in custody. "The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Colorado* v. *Connelly*, 479 U.S. 157, 170 (1986). This Court's decision in *Hoffa* v. *United States*, 385 U.S. 293 (1966), proves that the use of undercover agents does not amount to coercion. While Hoffa was on trial, he frequently met with a labor official named Edward Partin who was under indictment and who, unbeknownst to Hoffa, was cooperating with federal law enforcement authorities. During their conversations, Hoffa revealed his attempts to bribe members of the jury, and Partin recounted those statements at Hoffa's subsequent trial on jury tampering charges. 385 U.S. at 294-299. This Court rejected Hoffa's contention that admission of Partin's testimony violated the Fifth Amendment, holding that "no claim has been or could be made that [Hoffa's] incriminating statements were the product of any sort of coercion, legal or factual." *Id.* at 304. The Court also found that Hoffa's conversations with Partin were "wholly voluntary," even though Partin had duped Hoffa into believing that he was a sympathetic colleague. *Ibid.* See also *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969) (rejecting the claim that the confession of a defendant in custody was involuntary on the ground that he was falsely told that his co-defendant had turned state's evidence); *Procunier* v. *Atchley*, 400 U.S. 446, 453-454 (1971) (the use of an informant to obtain

a statement from a suspect in prison does not render his statement involuntary); *Flittie* v. *Solem*, 775 F.2d 933, 944-945 (8th Cir. 1985) (en banc), cert. denied, 475 U.S. 1025 (1986) (same).

This case is identical to *Hoffa* in that respect. Neither Agent Parisi nor Charlton intimidated or threatened respondent in any manner. Respondent voluntarily—and without hesitation—described how he had murdered Stephenson. The only difference between this case and *Hoffa* is that respondent was incarcerated when he spoke to Agent Parisi. But while that fact bears on the question whether Agent Parisi used the coercive nature of respondent's confinement to extract a confession that he would not have made outside of jail, see *Mauro*, 481 U.S. at 530, it is entirely immaterial to the question whether the use of an undercover agent to talk to a suspect renders any ensuing confession involuntary.

Hoffa stands for the proposition that the use of deception to elicit a confession from a suspect does not violate the Self-Incrimination Clause. That decision is also a complete answer to concerns voiced by the Illinois appellate court that the policies underlying *Miranda* forbid the police from surreptitiously obtaining incriminating statements from a suspect.

Although *Miranda* was not applicable to Hoffa's case, the Court's subsequent decision in *Oregon* v. *Mathiason*, *supra*, demonstrates that *Miranda* does not require a different result. *Mathiason* rejected the claim that an officer's act of falsely telling a suspect that the suspect's fingerprints had been found at the scene of a crime rendered the interview custodial in nature. "Whatever relevance this fact may have to other issues in the case," the Court held, "it has nothing to do with whether [Mathiason] was in custody for purposes of the *Miranda* rule." 429 U.S. at 495-496.

Respondent also can draw no support from the Court's Sixth Amendment decisions in *Massiah* v. *United States*, 377 U.S. 201 (1964), *United States* v. *Henry*, 447 U.S. 264 (1980), and *Maine* v. *Moulton*, 474 U.S. 159 (1985). Those cases held that the government may not use an undercover agent to elicit incriminating statements from a suspect once he is charged with a crime. After the initiation of formal charges, the Sixth Amendment ensures that the accused may rely on counsel as a medium between him and the State, and thus imposes on the government the "affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." *Moulton*, 474 U.S. at 176. The Court's decision in *Miranda*, by contrast, did not impose any such obligation on the police, since it did not forbid the police from attempting to obtain a suspect's confession. *Miranda* only limits an officer's opportunity to use a coercive setting to "extract" a confession from a suspect. *Mauro*, 481 U.S. at 530. Because that does not occur in cases like this one, the *Miranda* rules are inapplicable; those rules do not apply "outside the context of the inherently coercive custodial interrogations for which [they were] designed." *Roberts* v. *United States*, 445 U.S. 552, 560 (1980). See also *Murphy*, 465 U.S. at 430; *Mathiason*, 429 U.S. at 495; *Beckwith* v. *United States*, 425 U.S. 341 (1976).

The rule adopted by the Illinois appellate court would not, of course, mean that undercover officers would give suspects *Miranda* warnings before engaging them in conversation; no officer could possibly do so while maintaining his cover. Rather, the unavoidable consequence of that rule would be that law enforcement authorities would have to either release a suspect and then hope to find him (or impose 24-hour

surveillance on him) before pursuing their investigation, or abandon the use of undercover agents to engage incarcerated suspects in conversation.[10] The first approach poses the risk that the suspect will flee or commit additional crimes while at large. The second approach needlessly hampers effective law enforcement without protecting any legitimate constitutional interest.

Undercover investigations are often vitally important in obtaining proof of a suspect's guilt. Accordingly, this Court has repeatedly upheld the use of undercover operations and the deceit that necessarily accompanies that practice.[11] In some cases, such as

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[10] That may not be all that the Illinois appellate court sought to prohibit. It criticized not only "[Agent] Parisi's inquiry whether [respondent] had ever 'done someone,'" but also "the placement of [Agent] Parisi in the cellblock with [respondent]," Pet. App. 6a. That court may have intended to suggest that the latter technique *alone* constitutes a custodial interrogation under *Miranda*. If so, that suggestion is clearly in error under *Rhode Island* v. *Innis*, *supra*, because placing Agent Parisi in respondent's cellblock was no more a custodial interrogation than was placing Innis in the police squad car. Cf. *Kuhlmann* v. *Wilson*, 477 U.S. 436, 458-459 (1986) (holding that the use of a jailhouse informant to listen to, but not question, the defendant does not violate the Sixth Amendment; "the defendant must demonstrate that the police and their informant took some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks").

[11] See, *e.g.*, *Grimm* v. *United States*, 156 U.S. 604, 610-611 (1895); *Price* v. *United States*, 165 U.S. 311, 315 (1897); *Casey* v. *United States*, 276 U.S. 413, 418-420 (1928); *Lopez* v. *United States*, *supra*; *Lewis* v. *United States*, 385 U.S. 206 (1966); *Hoffa* v. *United States*, *supra*; *United States* v. *White*, 401 U.S. 745 (1971); *United States* v. *Russell*, 411 U.S. 423 (1973); *Hampton* v. *United States*, 425 U.S. 484 (1976).

this one, the use of an undercover agent is likely to be the only way for the authorities to identify and prosecute the responsible party. The costs imposed on law enforcement by the Illinois court's rule are therefore quite high; yet, the rule's benefits to Fifth Amendment values are virtually nil. Although the Court in *Miranda* believed that the inherently coercive setting created by a classic police custodial interrogation justified the regulation of that particular police investigative practice, the use of an undercover agent simply does not raise the same self-incrimination concerns.

CONCLUSION

The judgment of the Appellate Court of Illinois, Fifth Judicial District, should be reversed.

Respectfully submitted.

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